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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL WAGNER,

Defendant.

Case No. 2:10-cr-00399-MMD-GWF

ORDER

(Plf.'s Motion to Exclude Evidence  
– dkt. no. 93)

Before the Court is Plaintiff United States of America's Motion to Exclude Evidence. (Dkt. no. 93.) For the reasons discussed below, Plaintiff's Motion is granted in part and denied in part.

**I. ANALYSIS**

This case concerns wire fraud, bank fraud, and conspiracy to commit fraud arising out of Defendant Paul Wagner's alleged activities as a home builder and seller. The government charges Wagner with devising a scheme to sell homes by creating monetary incentives for straw buyers to purchase homes without disclosing these incentives to lenders.

The government seeks to exclude evidence regarding lender negligence on the grounds that such evidence is not relevant under Federal Rule of Evidence 402 and that whatever relevance it might have would be substantially outweighed by the evidence's prejudicial effect under Federal Rule of Evidence 403. The government argues that

1 evidence of lender negligence and lender practices is not a defense to bank or wire  
2 fraud. Wagner counters by arguing that evidence of lending standards and lending  
3 negligence will not be used as a defense, but rather to challenge the existence of  
4 materiality as an element of the charges at issue in this trial.

5 Materiality of falsehood is an element of the federal bank and wire fraud statutes.  
6 *Neder v. United States*, 527 U.S. 1, 25 (1999). A material false statement is defined as  
7 one that “has a natural tendency to influence, or is capable of influencing, the decision of  
8 the decisionmaking body to which it was addressed.” *Id.* at 16 (quoting *United States v.*  
9 *Gaudin*, 515 U.S. 506, 509 (1995)). Justifiable reliance and damages are not required,  
10 so the government need not prove that the victim relied on the false statements or was  
11 damaged by them. *Neder*, 527 U.S. at 24-25. For this reason, “it is no defense to wire  
12 fraud or bank fraud that the victim of the fraud was negligent, gullible, or incompetent.”  
13 *United States v. Maximov*, No. CR10-822, 2011 WL 4915162, at \*2 (D. Ariz. Oct. 17,  
14 2011).

15 Moreover, a misrepresentation may be material even if evidence demonstrates  
16 that the misrepresentation would not have *actually* influenced or *actually* deceived the  
17 lender. See *United States v. Rashid*, 383 F.3d 769, 778-79 (8th Cir. 2004), *cert.*  
18 *granted, judgment vacated on other grounds by Abu Nahia v. United States*, 546 U.S.  
19 803 (2005). What matters is whether the misrepresentation had a “natural tendency to  
20 influence the bank or was not capable of influencing the bank.” *Id.*

21 However, in order to determine materiality, a jury “must know something about the  
22 lenders’ decision-making process.” *Maximov*, 2011 WL 4915162, at \*3. “[A]lthough [a]  
23 [d]efendant cannot rely on loose lending practices of victim financial institutions as a  
24 defense to fraud, he can challenge the government’s evidence concerning applicable  
25 lending standards and thereby challenge the government’s assertion that the false  
26 statements were material.” *Id.*

27 As a result, evidence of lender policies or practices that intentionally disregard  
28 facts — such as those allegedly misrepresented by Wagner — is relevant and

1 admissible to show that the facts were not material. Such evidence is probative as to  
2 whether the false statements or non-disclosures “had a natural tendency to influence” or  
3 were “capable of influencing” the decisions of the lenders to provide the loans. See  
4 *Neder*, 527 U.S. at 16. If the lenders would have approved the loans even were the  
5 alleged incentives disclosed, and if the incentives would not have had a natural tendency  
6 to influence or been capable of influencing the lenders, Wagner’s misrepresentations  
7 would not be material, and the evidence of such lender practices would therefore be  
8 admissible. However, Wagner may not introduce evidence of lender practices to  
9 demonstrate that the lenders were negligent in providing loans to purchase the  
10 Indictment properties or that the lenders did not rely on any alleged statements and were  
11 not actually deceived by Wagner.

12 The government cites to *United States v. Reyes*, 660 F.3d 454, 468 (9th Cir.  
13 2011) for the proposition that materiality is viewed from the perspective of a reasonable,  
14 objective decision-maker, and that evidence of lender negligence and lending standards  
15 focuses on the actions of lender. *Reyes* concerned securities fraud, not bank or wire  
16 fraud, and was focused on the perspective of reasonable investors; it is thus inapplicable  
17 here. In addition, such evidence is relevant for demonstrating how an objective decision-  
18 maker — here, a lender — could or would have been influenced by the  
19 misrepresentations. For this reason, the government’s argument is inapposite.

20 Further, evidence going to the materiality of the alleged misrepresentations is  
21 highly probative, and not substantially outweighed by the threat of confusing and  
22 misleading the jury.

23 In sum, the government’s motion is granted to the extent Wagner seeks to  
24 introduce evidence of lenders’ negligence or loose lending practices as a defense to  
25 fraud. However, the government’s motion is denied to the extent Wagner seeks to  
26 introduce evidence of lenders’ practices and decision-making processes to contest  
27 materiality. As an example, Wagner cannot offer evidence to show that the lenders were  
28 not actually deceived by any alleged statements or that the lending representatives


1 involved did not actually review or rely on these statements. Wagner can introduce  
2 evidence to show that these statements were not material (i.e., not capable of  
3 influencing the lender's decision) because their lending practice is to not require or  
4 consider these statements. In other words, if the government's witness testifies that  
5 Wagner offered large cash incentives to real estate agents, then Wagner can offer  
6 evidence to show that the applicable lender's practice during the period in question was  
7 to not prohibit or review large cash incentives.

8 The Court may draw additional lines between what evidence falls within the type  
9 of lender negligence and loose lending practices that will be excluded during trial as  
10 evidence is actually presented.

11 **II. CONCLUSION**

12 Accordingly, IT IS HEREBY ORDERED that Plaintiff United States of America's  
13 Motion to Exclude Evidence (dkt. no. 93) is GRANTED IN PART AND DENIED IN PART.

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15 ENTERED THIS 25th day of September 2012.

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19 UNITED STATES DISTRICT JUDGE  
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